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LEGAL INCONSISTENCIES AFTER *ASTRUE V. CAPATO*: WHEN CHILDREN ARE CONCEIVED POSTMORTEM, DOES SOCIETY HAVE AN OBLIGATION TO SUPPORT THOSE CHILDREN?

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I. INTRODUCTION: THE CAPATOS: DEATH, BIRTH, AND GOVERNMENT BENEFITS

Like many newlyweds, Karen and Robert Capato dreamed of

starting a family. However, following their 1999 wedding, Robert was diagnosed with esophageal cancer.[1] After learning that the recommended cancer treatments could impair his fertility, the couple used a sperm bank to store Robert's sperm.[2] Unfortunately, Robert's condition quickly deteriorated and he lost his battle with cancer in March of 2002.[3]

After Robert's death Karen decided to use Robert's frozen sperm to attempt to conceive a child.[4] In 2003, eighteen months after Robert's death, Karen delivered twins.[5] Karen then applied for Social Security survivor's benefits for these children.[6] The Social Security Administration denied Karen's application based on the fact that the twins were not eligible to inherit under Florida intestacy law,[7] Florida being the state in which Robert Capato had been domiciled when he died.[8] Karen contested the result, thereby igniting a legal battle that ultimately ended at the United States Supreme Court in *Astrue v. Capato*.[9]

In May of 2012, the United States Supreme Court unanimously ruled in favor of the Social Security Administration and held that, in accordance with the relevant Social Security statute,[10] state intestacy law shall determine whether children conceived posthumously are entitled to collect survivor's benefits.[11] This ruling, while an accurate and logical interpretation of the relevant statute,[12] highlights the legal and ethical challenges

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1. Astrue v. Capato ex rel. B.N.C., 132 S. Ct. 2021, 2026 (2012).

2. *See id.* (banking Robert's sperm would later allow them to create the family they desired, although while undergoing cancer treatments Robert and Karen naturally conceived a son in 2001).

3. Capato ex rel. B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 627-628 (3d Cir. 2011) *cert. granted*, 132 S. Ct. 576 (2011), *rev'd and remanded sub nom. Capato*, 132 S. Ct. 2021.

4. *Capato*, 132 S. Ct. at 2026.

5. *Capato ex rel. B.N.C.*, 631 F.3d at 628.

6. *Id.*

7. *Capato*, 132 S. Ct. at 2025. *See also* FLA. STAT. ANN. § 732.106 (West 2010) (stating that to inherit intestate afterborn heirs must have been conceived before the decedent's death).

8. *Capato ex rel. B.N.C.*, 631 F.3d at 627.

9. *Capato*, 132 S. Ct. at 2026.

10. 42 U.S.C.A. § 416(h)(2)(A)(2004):

> In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

11. *Capato*, 132 S. Ct. at 2026.

12. 42 U.S.C.A. § 416(h)(2)(A).

arising from the ever-increasing use[13] of assisted reproductive techniques (hereinafter "ART"). Although *Capato* clarifies that state intestacy law governs in such cases, since not all state statutes directly address children conceived posthumously, this issue continues to play out in the courts.[14]

In Part II, this Comment will provide an overview of both the purpose of Social Security and the growth of ART, which has enabled posthumous conception to be a reality. Part III will then explain how ART has altered traditional notions about genetics[15] and parenthood, and has made Social Security's reliance on state intestacy statutes an undesirable method of awarding survivor's benefits.[16] Finally, Part IV of this Comment will argue that

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13. *See* Liza Mundy, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING MEN, WOMEN, AND THE WORLD 12 (2007) (describing how in 2004, 50,000 children were born using IVF, which was an 128% increase from 1996 and stating that "[e]very American adult now has either undergone fertility treatments or knows someone who has"). *See also FastStats-Infertility*, CTRS. FOR DISEASE CONTROL AND PREVENTION, www.cdc.gov/nchs/fastats/fertile.htm (last visited May 9, 2014) (stating that in the United States, 7.4 million women have used fertility services).

14. *See* Margery A. Beck, *Survivor's benefits for AI children conceived posthumously?*, THE LINCOLN JOURNAL STAR ONLINE, Sept. 27, 2012, http://journalstar.com/news/state-and-regional/statehouse/survivor-s-benefits-for-ai-children-conceived-posthumously/article_fe61955c-b11a-5837-b867-4627 1422b3b0.html#.UHsuTcRWAYg.email (showing Nebraska's Supreme Court heard a posthumous reproduction case in October 2012); *see also* Joseph H. Karlin, Comment, *"Daddy, Can You Spare A Dime?": Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317, 1348 (2006) (stating that courts will continue to see litigation in states where intestacy statutes are unclear regarding the rights of posthumous children or are construed to deny them the right to inherit). Although written prior to *Capato*, the continued reliance on state intestacy statutes means that this will likely hold true. *Id.*

15. *Compare* Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 301 (1999) (describing that the modern family is bound more by commitment and less by blood, since today's American family does not depend on a biological link with family members and many parents voluntarily choose to raise children not genetically their own), *with* Susan Frelich Appleton & D. Kelly Weisberg, ADOPTION AND ASSISTED REPRODUCTION: FAMILIES UNDER CONSTRUCTION 268-69 (2009) (raising the question of whether a biological connection should be essential to a child's status and rights and noting that the new Uniform Parentage Act § 707 (2000, amended 2002) places an importance on biology in that it allows a posthumous child to qualify for benefits or inheritance rights if prior to the death of the individual they consented to the postmortem use of their reproductive material); *but see Understanding the Uniform Parentage Act*, LAWYERS.COM, http://family-law.lawyers.com/paternity/The-Uniform-Parentage-Act-of-2002.html (last visited May 9, 2014) (noting that only seven states, Delaware, Texas, Washington, North Dakota, Utah, Oklahoma, and Wyoming, have adopted the most recent version of the law).

16. *See* Kristine S. Knaplund, *Equal Protection, Postmortem Conception, and Intestacy*, 53 U. KAN. L. REV. 627, 656 (2005) (stating that the federal law that allows the presumption of dependency based on state intestacy statutes,

allowing posthumously conceived children to collect such benefits unfairly burdens the federal taxpayer.[17] Therefore Congress should draft a narrowly construed Social Security amendment prohibiting posthumously conceived children from being deemed "dependents" or "survivors."[18]

II. BACKGROUND: THE HISTORY OF SOCIAL SECURITY AND ART

A. Social Security

Social Security was created in 1934 in the midst of the Great Depression to provide a financial safety net for Americans.[19] Social Security allows people over age sixty-five or those who lose a job to collect a monthly stipend.[20] Stipend amounts vary depending upon a number system of "credits" that takes into account both 1) years of employment and 2) previous income level.[21] This program is

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provides an incentive for a person to use a deceased wage earner's sperm). In the era of ART, survivor's benefits should not provide an incentive to use one individual's sperm over another, or provide a financial windfall for those who do use a deceased wage earner's sperm. *Id.*

17. *See id.* at 627 (describing that a widow who desires to have a child can chose between an anonymous sperm donor or, if her husband stored sperm prior to his death, can choose the sperm of her husband). While choosing her former husband might be desirable for many reasons, her choice may also be impacted by the fact that the federal government has "inadvertently" created financial incentives for her to use her dead partner's sperm. *Id.* at 627-28. For example, she may be eligible for survivor's benefits for both her and the child amounting to "cash payments totaling hundreds of dollars [each] month for years." *Id.* at 628.

18. *See* Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 272 (Mass. 2002) (demonstrating that this need for legislation has been previously stated:

> As these technologies advance, the number of children [born using ART] they produce will continue to multiply. So, too, will the complex moral, legal, social, and ethical questions that surround their birth. The questions present in this case cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehensive response reflecting the considered will of the people.).

Compare with Banks, *supra* note 15, at 259 (Congress should amend the Act to expressly address the relational status of such children).

19. *Historical Background and Development of Social Security*, SOCIAL SECURITY, www.ssa.gov/history/briefhistory3.html (last visited May 9, 2014). *Accord* Kathryn L. Moore, *The Future of Social Security: Principles to Guide Reform*, 41 J. MARSHALL L. REV. 1061, 1063 (2008) (describing how at Social Security's outset President Roosevelt explained its purpose, "We can never insure one hundred percent of the population against one hundred percent of the hazards and vicissitudes of life, but we have tried to frame a law which will give some measure of protection to the average citizen against a job loss or poverty-ridden old age.").

20. SOCIAL SECURITY, *supra* note 19.

21. *See* Banks, *supra* note 15, at 310 (explaining that the employee's

largely paid for through payroll taxes placed upon employed citizens.[22]

Survivor's benefits were first added to Social Security in 1939.[23] If a wage earner dies, these benefits provide monthly payments for widows, surviving dependent children, and surviving dependent parents.[24] In order to receive benefits, the individual must be able to demonstrate actual dependency upon the decedent at the time of death.[25] In recognition that not all children will be deemed dependent if a parent dies,[26] state intestacy law governs who can qualify to receive benefits.[27] Thus, while state intestacy statutes are drafted with the intent to determine the distribution of personal property, these statutes also directly impact who qualifies for survivor's benefits.

B. Assisted Reproductive Techniques

Analyzing whether survivor's benefits should extend to posthumously conceived children requires an understanding of how ART has permanently altered the ways in which many modern families are created.[28] All human life begins with the

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earning history indicates whether the worker has accumulated enough credits, which are gained through employment, to allow the worker to collect Social Security payments). The amount of Social Security that the worker receives corresponds to their average earnings. *Id.*

22. SOCIAL SECURITY, *supra* note 19; *see also* Banks, *supra* note 15, at 307-08 (describing that in 1937, Social Security began to be funded by specially created trust funds that held money collected from taxes placed on worker's earnings).

23. SOCIAL SECURITY, *supra* note 19; *accord* Banks, *supra* note 15, at 305-06 (explaining that benefits were extended to the dependents of workers who had accumulated enough qualified earnings).

24. SOCIAL SECURITY, *supra* note 19; *accord* Banks, *supra* note 15, at 311-12 (describing that an applicant's "relational status to a deceased wage earner is paramount" in obtaining survivor's insurance benefits). Potential dependents include the widow or widower, children of the deceased who remain unmarried and are under the age of eighteen, the parent of the deceased's child if the child is under sixteen years old, parents over age sixty-five who were dependent on the deceased, and surviving divorced spouses. *Id.*

25. John Doroghazi, Note, *Gillett-Netting v. Barnhart and Unanswered Questions about Social Security Benefits For Posthumously Conceived Children*, 83 WASH. U. L.Q. 1597, 1606-07 (2005).

26. *See Survivor's Benefits*, SOCIAL SECURITY 1, 4 (2012), www.ssa.gov/pubs/10084.pdf (stating when a working parent dies, ninety-eight out of every 100 children will be eligible to receive survivor's benefits); *see also Capato*, 132 S. Ct. at 2032 (explaining that "[t]he aim was not to create a program generally benefiting needy persons; it was . . . to provide . . . dependent members of a wage earner's family with protection against the hardship occasioned by the loss of the insured's earnings.").

27. 42 U.S.C.A. § 416(h)(2)(A).

28. *See* Tom Frame, CHILDREN ON DEMAND: THE ETHICS OF DEFYING NATURE 17 (2008) (describing the expansion of ART as a virtual revolution offering possibilities for parenthood that were unimaginable in years prior).

union of a sperm, provided by the male, and an egg, provided by the female.[29] While in most cases this occurs without assistance,[30] an entire industry now exists to offer assistance to couples experiencing infertility.[31] One consequence[32] of the growth of this industry has been the "mainstreaming" of ART;[33] these services are now being utilized by people who are not experiencing problems with infertility, but can otherwise benefit from the assistance of reproductive services.[34]

Assisted reproduction involves the storage and manipulation of gametes, human reproductive material more commonly referred to as eggs and sperm.[35] The oldest ART procedure is artificial insemination, which manipulates the introduction of sperm into the female's reproductive system.[36] Another option is in vitro

29. *See* PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION & RESPONSIBILITY: THE REGULATION NEW BIOTECHNOLOGIES 24 (2004) (explaining that gametes are the "precursors" of all human life); *see also* Banks, *supra* note 15, at 269 (stating that "[p]rior to conception, human gametes consist of the female egg and the male sperm.").

30. *See* DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 1 (2006) (stating that baby-making is "the oldest production known to humankind" and for most people creating a baby is so simple that it often happens by accident).

31. *See* Frame, *supra* note 28, at 144 (describing the fertility industry as a big business that produces substantial profits and employs thousands of people worldwide).

32. *See* Mundy, *supra* note 13, at 11 (discussing consequences and noting that creating a means for people to reproduce without having sex "has had consequences both expected and unforeseen . . . [r]eproductive technology is mirroring social change, but it also enables and drives that change, in ways that will affect every single citizen, and probably already have.").

33. *Id.* at 11. "So broad is the patient base, and so eager is the field to accommodate them, that assisted reproduction has gone from being an oddball, fringe technology to being perhaps the most socially influential reproductive technology of the twenty-first century." *Id.*

34. *See* Mary Warnock, MAKING BABIES: IS THERE A RIGHT TO HAVE CHILDREN? 55 (2002) (explaining that people utilizing assisted reproduction techniques include those who are not infertile, such as homosexuals trying to start a family, couples whose children would have a high risk of having an inherited disease, or individuals desiring to store their genetic material for a time when it is more convenient to have children, such as a successful ballerina waiting until her performance days are over); *Accord* Mundy, *supra* note 13, at 10-11 (describing that fertility services are being utilized by people who want to start a family but do not have a partner or spouse, lesbian women and gay men, and patients who want to ensure that their children do not inherit certain genetic diseases).

35. *See* Banks *supra* note 15, at 269 (describing eggs and sperm as the beginnings of human life).

36. *See* Ruth Deech & Anna Smajdor, FROM IVF TO IMMORTALITY 15 (2007) (explaining that artificial insemination was proscribed by a doctor during the 1700s); *Accord* APPLETON & WEISBERG, *supra* note 15, at 239 (describing how evidence shows AIH, artificial insemination with the husband's sperm, began in the 1790s whereas AID, artificial insemination with sperm provided by a donor, began in 1884); *see also* Jenna M. F. Suppon, *Life After Death: The Need to Address the Legal Status of Posthumously Conceived Children*, 48 FAM. CT.

fertilization, which was first successful in 1978[37] and requires extracting a woman's eggs, fertilizing them in a laboratory, and then placing the newly fertilized embryo(s) into the woman's uterus.[38]

These techniques are made possible through cryopreservation, the freezing of sperm, eggs, and embryos at very low temperatures.[39] By allowing the genetic material to survive for extended periods of time, cryopreservation is largely responsible for the success and expansion of ART.[40] Using cryopreservation, people can now preserve their sperm or eggs for future use, including use after they have died.[41] It is cryopreservation that has made posthumous conception a reality.

C. Posthumous Birth Versus Posthumous Conception

Posthumous conception varies importantly from posthumous birth; while posthumous birth has existed since the dawn of time,[42] posthumous *conception* began only with the availability of cryopreservation.[43] Posthumous conception can take place weeks, months, or even years after the death of the parent whose gametes are used.[44] While society grapples with whether posthumously

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REV. 228, 230 (2010) (explaining that artificial insemination was one of the earliest, least expensive, and most successful reproductive technology methods available).

37. *See* Mundy, *supra* note 13, at 7-8 (telling of how the scientist Robert Edwards and gynecological surgeon Patrick Steptoe orchestrated the birth of Louise Joy Brown, the first IVF baby in Oldham, England in 1978).

38. Suppon, *supra* note 36, at 230.

39. Banks, *supra* note 15, at 257 ("The increase in use of assisted reproduction is due largely to the development of the process of cryogenetical freezing of human concepti.").

40. *See* PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 29, at 29 (2004) (referring to cryopreservation as "essential" and integral part of ART); *see also* Deech & Smajdor, *supra* note 36, at 24 (describing how freezing techniques are used in many different reproductive therapies with differing levels of success). Success rates vary because while sperm and embryos are easy to thaw and unthaw, eggs are more difficult to successfully freeze. *Id.*

41. John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1035 (1994).

42. *See* Susan L. Crockin, J.D. & Howard W. Jones Jr., M.D., LEGAL CONCEPTIONS: THE EVOLVING LAW AND POLICY OF ASSISTED REPRODUCTIVE TECHNOLOGIES 276 (2010) (stating that long before ART, children have been born after the death of their fathers and that the law has previously dealt with clarifying legal issues concerning posthumously *born* children).

43. *See* Doroghazi, *supra* note 25, at 1601-02 (stating that when it comes to posthumous conception, cryopreservation is the most important assisted reproduction technique).

44. *See* Banks, *supra* note 15, at 270 (explaining that when the freezing temperature is minus 100 degrees Celsius, sperm can remain frozen for at least ten years); *see also* Kathryn Venturatos Lorio, *Conceiving the Inconceivable: Legal Recognition of the Posthumously Conceived Child*, 34 ACTEC L.J. 154, 155 (2008) (stating that a child was born using sperm frozen

conceived children have a right to survivor's benefits,[45] children conceived prior to their parent's death but born afterwards are immune from this legal debate.[46]

D. The Curious Intersection of Social Security Survivor's Benefits and Posthumous Reproduction

Social Security's reliance on intestate succession law arose in an era when ART's influence could not have been foreseen.[47] Legal inconsistencies occur partly because as the use of ART has grown, the federal, state, and local governments have failed to create legislation to keep pace with the changing constructions of American families.[48] As a result, the legal status of posthumous children varies significantly across state lines. Currently fourteen states have legislation that applies specifically to posthumously conceived children.[49] Five of those states deny the children the right to inherit from the deceased parent's estate.[50] Nine states allow intestate inheritance but make it contingent upon certain requirements being satisfied.[51]

Although posthumous conception still takes place in relatively

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for twenty-one years, *citing Baby Born from Sperm Frozen for Record 21 Years*, OBESITY, FITNESS & WELLNESS WEEK, June 19, 2004, at 59).

45. *See* Banks, *supra* note 15, at 256 (explaining that since the 1980s, the incredible advancements in medical technology for ART created an entirely new "class of children" that has left the legal community confronting "a myriad of novel issues and controversies" that have not previously been addressed by legislation).

46. *See* Appleton & Weisberg, *supra* note 15, at 267 (stating that "[a] common law presumption, now codified in many states, legitimates a child born within nine months after the death of the mother's husband."); *See also* Crockin & Jones, *supra* note 42, at 276 (explaining that most states have either statutes or case law that acknowledges paternity of children born within a certain time period, often a year, after the death of their presumed father); *see also* Uniform Parentage Act § 204 (2002) (explaining that a man is the presumed father of a child if he was married to the child's mother and the child is born within 300 days of the man's death).

47. *See Capato*, 132 S. Ct. at 2026 (stating that "[t]he technology that made the twins' conception and birth possible, it is safe to say, was not contemplated by Congress when the relevant provisions of the Social Security Act (Act) originated (1939) or were amended to read as they now do (1965).").

48. Appleton & Weisberg, *supra* note 15, at 235.

49. *Karlin*, *supra* note 14, at 1335.

50. *See id.* (listing Georgia, Idaho, South Carolina and Virginia as denying intestate inheritance). Florida also denies intestate inheritance, but does allow posthumous children to make claims against the decedent's estate unless the child was specifically provided for in the decedent's will. *Id.*

51. *See id.* (explaining that if the individual consented to the posthumous use of their gametes a child can inherit in the following states: California, Colorado, Delaware, Louisiana, North Dakota, Texas, Utah, Washington, and Wyoming).

small numbers, these numbers are on the rise.[52] In recent years, courts have seen a dramatic increase in cases involving this topic.[53] Most of these cases deal specifically with inheritance rights and Social Security benefits,[54] and the facts usually bear striking similarity to those presented in *Capato*.[55] The fact that many state intestacy statutes are silent on the topic of posthumous reproduction[56] leaves courts trying to decipher legislative intent when posthumous reproduction likely could not have even been foreseen when the legislation was drafted.[57] In applying state intestacy law to these novel questions, courts across the country

52. *See* Major Maria Doucettperry, *To Be Continued: A Look at Posthumous Reproduction As It Relates to Today's Military*, ARMY LAW., May 2008, at 1, 2 (explaining that posthumous conceptions are an increasingly relevant issue due to the growing use of ART procedures, the ability to bank sperm or eggs before undergoing medical procedures that may impair fertility, and military members choosing to bank their genetic material before being deployed into highly dangerous areas).

53. *See id.* at 8 (explaining that beginning in 1993, state and federal courts have seen increasing numbers of cases regarding posthumously conceived children's right to inherit and to collect survivors benefits); *see also* Suppon, *supra* note 36, at 231 (explaining that the absence of legislation has forced courts to determine the legal status posthumously conceived children have regarding inheritance and benefits).

54. *See* Doucettperry, *supra* note 52, at 8 (stating that most cases deal exclusively with benefits or inheritance rights).

55. *Compare Capato*, 132 S. Ct. at 2025-26, *with* Beeler v. Astrue, 651 F.3d 954, 957 (8th Cir. 2011) *cert. denied*, 132 S. Ct. 2679 (2012) (stating that widow used the sperm her husband had stored during cancer treatment to conceive a child after his death and then filed suit to collect Social Security benefits for that child), and Stephen v. Comm'r of Soc. Sec., 386 F.Supp.2d 1257, 1259 (11th Cir. 2005)(stating a widow lost her husband to a heart attack, had his sperm collected posthumously, used it to conceive, and then brought a suit to collect survivor's benefits), and Gillett-Netting v. Barnhart, 371 F.3d 593, 594-95 (9th Cir. 2004) *abrogated by Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (explaining a widow requested Social Security benefits for her posthumously conceived twins), *and* Finley v. Astrue, 270 S.W.3d 849, 850-851 (2008) (stating that after her husband died a widow used a frozen embryo from fertility treatments she and her husband had undergone while he was alive, and then filed suit to collect survivor's benefits for that child), *and Woodward*, 760 N.E.2d at 260 (stating that a widow sued to collect Social Security for twins she conceived after her husband passed away using sperm he had stored during his cancer treatment), and Khabbaz v. Comm'r, Soc. Sec. Admin., 930 A.2d 1180, 1182 (2007) (stating that widow brought suit to collect Social Security benefits for her daughter who was conceived posthumously by sperm that her husband had stored prior to treatment for cancer).

56. *See* Cynthia E. Fruchtman, *Tales from the Crib: Posthumous Reproduction and Art*, 33 WHITTIER L. REV. 311, 318-319 (2012) (stating at the time author wrote the article only fourteen states had specifically enacted statutes regarding posthumous reproduction).

57. *See* Banks, *supra* note 15, at 320 (mentioning that "[t]here is no doubt that early lawmakers never envisioned a time when social protocol and scientific advancements would compel equal treatment for dependent non-marital children, after-born children, adopted children, and even step-children.").

have come to differing conclusions.[58] The results of two cases decided by the state supreme courts in the neighboring states of Massachusetts and New Hampshire illustrate how courts grappling with the same question come to alternate conclusions.

In Massachusetts, Lauren Woodward was widowed after her husband lost his battle with leukemia.[59] Two years later she gave birth to twins she conceived using her husband's banked sperm.[60] After being denied Social Security benefits for the twins she filed suit.[61]

In the resulting case, *Woodward v. Commissioner of Social Security*, the Massachusetts Supreme Court looked at the state intestacy law which provided that "posthumous children shall be considered living at the death of their parent."[62] Since the Massachusetts legislature did not define posthumous children when it drafted the statute in the 1800s,[63] the court in *Woodward* determined that there was no definitive requirement that posthumous children "be in existence" at the time of the decedent's death.[64] Although the date the statute was written indicates that originally it could only have referred to posthumously *born* children,[65] the court declined to bar posthumously *conceived* children from inheriting in the absence of "express legislative directive."[66]

In New Hampshire, Donna Eng also lost her husband, Rumzi Brian Khabbaz, to cancer.[67] After his death, she used sperm that her husband had banked during cancer treatments and conceived a daughter.[68] Like Woodward, she then applied for survivor's benefits for her daughter and was denied.[69] In *Khabbaz v. Commissioner of Social Security*,[70] the Supreme Court of New Hampshire examined the intestacy statute, which stated that

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58. *See* Crockin & Jones, *supra* note 42, at 279 (listing the states where courts have ruled on the legal parentage of posthumously born children). States where judicial decisions determined that posthumously born children were children of the deceased are Massachusetts, New Jersey, Louisiana and Arizona. *Id.* In contrast, Arkansas, California, and New Hampshire did not acknowledge posthumous parenthood. *Id.*

59. *Woodward*, 760 N.E.2d at 260.

60. *Id.*

61. *Id.* at 260-261.

62. *Id.* at 264.

63. *See id.* (explaining that the posthumous children provision has remained unchanged for 165 years).

64. *Id.*

65. See *id.* (describing that a statute written in the 1800s could not have conceivably taken into consideration posthumous conception).

66. *Id.* at 265.

67. *Khabbaz*, 930 A.2d at 1182.

68. *Id.*

69. Id.

70. *Id.* at 1180.

"surviving issue" can inherit.[71] Stating that, "the plain meaning of the word surviving is remaining alive or in existence"[72] the court held that the statute required her to be alive or in existence at the time of her father's death.[73] Under this analysis the court stated simply, "She was not. She was conceived more than a year after his death."[74] The court further stated that no posthumously conceived children could be deemed "surviving issue" within the plain meaning of the statute.[75]

Woodward and *Khabbaz* demonstrate the divergent results that occur when courts must apply antiquated statutes to the modern reality of posthumously conceived children. States that have passed such legislation are divided over the issue of whether these children should be able to inherit intestate.[76] Although the federal government cannot directly dictate state legislation,[77] since survivor's benefits are a *federal* program it would be prudent to reach identical results regardless of the state in which their deceased biological parent happened to be domiciled. An amendment to the Social Security statute would provide the needed clarity and consistency.

III. ANALYSIS

The outcomes of *Khabbaz* and *Woodward* illustrate the differing results that occur when courts are forced to reconcile the legislative intent of state intestacy law with the modern reality of posthumous reproduction.[78] The continued presence of these cases[79] made headlines again on October 10, 2012, when the

71. *Id.* at 1183.
72. *Id.* at 1183-1184.
73. *Id.* at 1184.
74. *Id.*
75. *Id.*
76. *See Karlin*, *supra* note 14, at 1335 (discussing the fourteen states that have passed legislation and the variation in whether they allow posthumous children to inherit intestate).
77. *See* New York v. United States, 505 U.S. 144, 188 (1992) (explaining that while the federal government may create legislation that preempts state legislation or may create incentives for states to "adopt regulatory schemes" the federal government cannot compel state legislation).
78. *See generally Woodward*, 760 N.E.2d at 272 *and Khabbaz*, 930 A.2d at 1186 (explaining how two courts reach opposite conclusions based on differing state statutes).
79. *Posthumously Conceived Child Isn't Eligible for Survivorship Benefits*, 37 FAM. L. REP. 1279 (Apr. 19, 2011), *available at* http://ezproxy.jmls.edu:2078/flln/FLLNWB/split_display.adp?fedfid=20556520&vname=flrnotallissues&wsn=497075000&searchid=22312108&doctypeid=1&type=date&mode=doc&split=0&scm=FLLNWB&pg=0 (quoting Steven Snyder, Chair of the ABA Family Law Section's Assisted Reproductive Technologies Committee, as saying, "Posthumous reproduction is here to stay. The cases will only become more numerous and more complex.").

Nebraska Supreme Court heard arguments in one such posthumous reproduction case, *Amen v. Astrue*.[80] The continued absence of clear state intestacy statutes means that *Capato* will not end the flow of these cases through the court system.

Underlying all of these cases is the fundamental question of whether society has a duty to help support these children. This Comment will explain that society owes no duty[81] to provide survivor's benefits to posthumously conceived children and that the relevant federal statute should be amended to reflect this. Providing posthumously conceived children with survivor's benefits violates the original intent of Social Security and exemplifies how Americans have become too reliant on entitlement benefits. It also places an overemphasis on genetic relationships in an era when families are increasingly formed without genetic links to one or both parents, and it unfairly burdens the federal taxpayer in a misguided attempt to provide for the best interests of the child.

A. The Inherent Flaws in Relying on State Intestacy Law

Matters of inheritance and family law are generally within the province of the states, and admittedly, it is proper for state law to regulate whether posthumously conceived children may inherit intestate. However, the changing structure of American families highlights the inadequacy of Social Security's reliance on state law in awarding benefits. Intestate inheritance pertains only to the distribution of the deceased's own property. It does not logically follow that federal taxpayers should bear the burden of supporting the posthumously conceived solely because a state intestacy statute included them, when these individuals were likely excluded from the federal law's statutory intent.[82] In fact, when Congress amended survivor's benefits in 1965 it was actually an attempt to move past the arbitrary reliance on state intestacy law.[83]

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80. THE LINCOLN JOURNAL STAR ONLINE, *supra* note 14.

81. *See* Robert P. Stoker & Laura A. Wilson, WHEN WORK IS NOT ENOUGH: STATE AND FEDERAL POLICIES TO SUPPORT NEEDY WORKERS 1-2 (2006) (detailing programs through which society fulfills any existing duty to aid needy children and families in economic distress, including food stamps and free and reduced-price school meals, the Earned Income Tax Credit (EITC), state health insurance programs for children, the child tax credit, Medicaid, Temporary Assistance for Needy Families (TANF), child care grants, and rental housing assistance). The availability of these programs demonstrates that a posthumously conceived child's failure to qualify for survivor's benefits does not preclude them from receiving other financial assistance if needed).

82. *See* Schafer v. Astrue, 641 F.3d 49, 58 (4th Cir. 2011) (stating that the intent of survivor's benefits is to protect survivors after the unanticipated death of a parent).

83. *See* Margaret Ward Scott, *A Look at the Rights and Entitlements of*

B. Posthumously Conceived Children are Outside the Legislative Intent of the Law

1. Legislative Intent

Examining the purpose of survivor's benefits may be as simple as examining the word survivor. Put simply, a survivor is "one who outlives another."[84] While Congress could have labeled the 1939 addition to Social Security as "Descendant's Benefits" or "Family Benefits," Congress chose to place the focus on those *surviving* the death of the wage earner.[85]

Courts that have chosen to award such benefits to the posthumously conceived favor a liberal interpretation of survivor's benefits.[86] In *Gillett-Netting v. Barnhart*, the Ninth Circuit explained their reasoning to provide posthumously conceived twins with survivor's benefits by stating, "the Act is construed liberally to ensure that children are provided for financially after the death of a parent."[87] Perhaps this construction is too liberal. Was the Act really designed to provide widows or widowers with financial support to embark on a second chance at starting a family?[88]

Posthumously Conceived Children: No Surefire Way to Tame the Reproductive Wild West, 52 EMORY L.J. 963, 976 (2003) (citing S. REP. NO. 404, at 110 (1965) (describing that Congress moved away from the heavy reliance on state intestacy law in an effort to avoid penalizing illegitimate children for being born to unwed parents). Although posthumous children are also born outside of marriage, it is not their illegitimate status that precludes them from collecting survivor's benefits; rather, it is that they do not qualify as survivors. *Id.*

84. BLACK'S LAW DICTIONARY 898 (9th ed. 2009).

85. *See* Robert Barnes, *Complications Beset Posthumous Reproduction Case*, WASH. POST, Mar. 19, 2012, www.washingtonpost.com/politics/complications-beset-posthumous-conception-case/2012/03/19/gIQAR5i0NS_story.html (discussing how during oral arguments in *Capato*, Scalia questioned how posthumous children could be deemed survivors if they were not conceived at the time of their father's death). *See generally Capato*, 132 S. Ct. 2021.

86. *See* Banks, *supra* note 15, at 308-09 (explaining that, at the time the article was written in 1999, federal courts had taken a liberal approach in interpreting survivor's benefits and had chosen to award benefits if at all possible). This intent, coupled with a conflicting desire to avoid frivolous claims, created a tension between honoring the remedial goals of the Act with the need to protect the system from becoming increasingly overburdened. *Id.* Although the article was written thirteen years ago, the tension remains and the courts continue to attempt to balance these interests. *Id.*

87. *Gillett-Netting*, 371 F.3d at 598.

88. *See Schafer*, 641 F.3d at 59 (explaining that posthumous children "come into being *after* it is clear that one of the parents will not be able to support the child in the ordinary way during the child's lifetime, meaning that the survivorship benefits would serve a purpose more akin to subsidizing the continuance of reproductive plans than to insuring against unexpected losses."(emphasis in original)).

The fact that benefits are offered to children who survive the death of a parent does not create an obligation to offer such benefits to all children who could have hypothetically been born to the wage earner if he or she had not died.[89] This is why the Social Security Administration places an emphasis on being dependent upon the wage earner.[90] When the death of the biological parent precedes the conception of a child there can be no real dependency on the deceased.

2. Concerns with an Entitlement Society

If, as the Social Security Administration reasons in *Amen*, the original purpose of survivor's benefits was to "protect children from the loss of support due to the unanticipated death of a parent,"[91] what are we to make of the willingness of some states to extend survivor's benefits so far beyond this intent? Proponents of this extension explain it as a benevolent attempt to provide for the

89. *See* Garner v. Richardson, 333 F. Supp. 1191, 1195-96 (9th Cir. 1971) (involving a case where the five illegitimate children of a deceased wage earner applied for survivor's benefits and the court concluded that, "Congress is not obligated to provide benefits for every individual who might conceivably have been dependent upon the wage earner for support"). Although this case predates the posthumous conception debate, the analysis over where to draw the line for survivor's benefits remains relevant. *Id.*

90. *See Capato*, 132 S. Ct. at 2032 (citing Califano v. Jobst, 434 U.S. 47, 52 (1977)) (referencing the importance of dependency, "[t]he aim was not to create a program generally benefiting needy persons; it was, more particularly, to provide . . . *dependent* members of a wage earner's family with protection against the hardship occasioned by the loss of the insured's earnings"(internal quotations omitted) (emphasis added)); and Mathews v. Lucas, 427 U.S. 495, 507 (1976) (stating that the Social Security Act's requirement that child be deemed "legitimate" is "ultimately relevant only to the determination of dependency, and by reference to legislative history indicating that the statute was not a general welfare provision for legitimate or otherwise 'approved' children of deceased insureds, but was intended just 'to replace the support lost by a child when his father . . . dies.'"); *but see Gillett-Netting*, 371 F.3d at 599, *abrogated by Capato*, 132 S. Ct. 2021 (sidestepping the importance of dependency by ruling that since Arizona had eliminated the status of "illegitimate" the twins are Netting's legitimate children under Arizona law). They are therefore deemed dependent under § 402(d)(3) and do not have to show actual dependency under the provisions of § 416(h). *Id.* Although abrogated by *Capato*, this illustrates the broad strokes that courts implement when attempting to show that posthumously conceived children where somehow dependent upon the deceased at the time of his or her death. *Id. Capato* 132 S. Ct. 2021.

91. Brief for Defendant at 1, Amen v. Astrue, 284 Neb. 691 (2012) (No. S-11-1094) 2012 WL 933906, at *1 (emphasis added). *See also* Beeler v. Astrue, 651 F.3d 954, 966 (8th Cir. 2011) (stating "But whether the granting of child's insurance benefits to B.E.B., a posthumously conceived child, would further the purposes of the Social Security Act is debatable, given the Act's basic aim of primarily helping those children who lost support after the *unanticipated death* of a parent." (internal quotations omitted) (emphasis in original)).

best interests of the child.[92] Yet, we do not provide monetary benefits to children conceived through ART and born to single parents by choice. Thus, the best interests of the child argument protects the children born to known sperm donors while conveniently ignoring those conceived using anonymous sperm donors.

The expansion of survivor's benefits to include those who did not actually survive the death of the wage earner is indicative of America's growing entitlement mentality.[93] This expansion has created a "taker mentality"[94] in which increasing numbers of Americans receive entitlement benefits, such as Social Security, without a concern for our nation's inability to sustain this economic path.[95] This Comment does not question the merits of Social Security in general, but reasons that as we struggle to finance these programs, it is hardly wise to extend Survivor's Benefits to those who cannot be classified as *survivors*, even under the most liberal standards.

C. What Makes One a Parent? How Providing Posthumously Conceived Children with Survivor's Benefits Overemphasizes the Importance of a Genetic Connection

Awarding survivor's benefits to posthumously conceived children places an artificial importance on genetics.[96] Many loving and functional families exist where children may not have any genetic link to one or both of the parents raising them; this is evidenced through the growth of ART with its use of donor eggs,

92. *See* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925) *and* Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 660-61 (2008) *infra* note 112 (discussing the best interest of the child argument).

93. *See* Nicholas Eberstadt, *Are Entitlements Corrupting Us? Yes, American Character Is at Stake*, WALL ST. J., Aug. 31, 2012, *available at* http://online.wsj.com/article/SB10000872396390444914904577619671931313542.html (explaining that while America began as a country where citizens would often refuse handouts, in the last century our populace has grown to rely on entitlement benefits that cost us over two trillion dollars a year, Social Security payments accounted for over 690 billion dollars in 2010).

94. *Id.*

95. *See id.* (stating that Washington understands that the "national hunger for entitlement benefits" has led to a "financially untenable trajectory").

96. *See* Mundy, *supra* note 13, at 12-13 (describing the confusion that ART has created, specifically regarding biological connections, "Reproductive technology is confusing, and confused. It both affirms and denies the importance of genetic inheritance."). This confusion likely contributes to difficulty within courts and the legislature in determining the weight to give to genetic connections in the absence of parental involvement. *Id.*

donor sperm, and surrogacy, the increased rates of domestic and overseas adoptions, and rising numbers of gay and lesbian parents creating families.[97] This has proven that genetics alone do not make a family or create a parent.[98] Our laws recognize the limited importance of genetics through termination of parental rights when birthparents place their children for adoption. Additionally, several states have laws stipulating that sperm and egg donors forfeit all parental rights and responsibilities.[99]

Despite the decreased importance of genetics in the formation of many modern American families, proponents of awarding survivor's benefits to posthumously conceived children often focus on the biological connection between the deceased parent and the child. The Third Circuit expressed this viewpoint in *Capato* and questioned why the Court would even look to the text of the survivor's benefits statute when the child was the undisputed biological child of the deceased.[100]

While the Capato twins are indeed Robert Capato's biological offspring, what, if anything, does this mean? Adoption, sperm donation, and egg donation demonstrate that biological connections alone do not make a parent.[101] In *Children on Demand: The Ethics of Defying Nature*, Tom Frame explains that

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97. *See id.* at 99:

> Assisted reproduction is shaping, and complicating, the way we think about genetic relationship and its impact on family ties. In a major and largely unnoticed irony, in vitro fertilization-developed explicitly as a way to help infertile couples have their own children-now makes possible families in which the power of biological relationships is often both affirmed and denied, the importance of genetic inheritance simultaneously embraced and rejected.

98. *See* Banks, *supra* note 15, at 276 (stating that "Parental prerogatives such as custody, support, and visitation are not exclusively assigned based upon a person's biological connection with a child.").

99. *See* Appleton & Weisberg, *supra* note 15, at 264-265 (stating that the law does not recognize semen donors as fathers); *see also* Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved In the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 973-74 (2009) (stating that while a sperm donor may be the "biological parent" of the child in question, many states now have statutes "stripping him of that status . . . [and] reliev[ing] him of any parental duties to the child.").

100. *Capato*, 631 F.3d at 631; *but see Capato*, 132 S. Ct. at 2030 (demonstrating that the Supreme Court recognized this focus on biology as a misguided form of reasoning and explained that there is nothing in the legislative history to show that Congress understood "child" to have any special meaning pertaining to biological parentage or the marriage of the parents).

> As the SSA points out, in 1939, there was no such thing as a scientifically proven biological relationship between a child and a father, which is . . . part of the reason that the word 'biological' appears nowhere in the Act. Notably, a biological parent is not necessarily a child's parent under law. *Id.*

101. *See* Banks, *supra* note 15, at 301 (stating that the modern reality of American families does not depend "solely upon one's biological affiliation" with family members).

when a child is created posthumously it must be acknowledged that while "the child's father was plainly essential for the production of the child [he] is apparently unnecessary for the child's continuing care and nurture . . . He is the child's father only in name . . . In one sense, the child has no father."[102] While Frame refers only to fathers, his point would be applicable to cases of posthumous motherhood as well.[103] Posthumously conceived children are in many regards similar to children conceived to single parents via anonymous egg or sperm donation. In both instances, the intended parent makes a choice to parent alone. In each scenario, the child conceived will grow up not ever knowing one of their biological parents.

D. Who Bears the Responsibility of Safeguarding the Best Interests of the Child? The Danger Present in Replacing Parental Responsibility with a Societal Duty

1. The Equal Protection Argument

Advocates of providing survivor's benefits to posthumously conceived children maintain that it protects the child's right to equal protection under the law. The Massachusetts Supreme Court expressed this opinion in *Woodward* when it opined:

> Posthumously conceived children may not come into the world the way the majority of children do. But they are children nonetheless. We may assume that the Legislature intended that such children be entitled, in so far as possible, to the same rights and protections under law as children conceived before death.[104]

The above quote misconstrues the argument.[105] Of course

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102. Frame, *supra* note 28, at 177.

103. *See* Evelyne Shuster, *Dead Parents Cannot Parent*, CHI. TRIB., Jan. 1, 1998 http://articles.chicagotribune.com/1998-01-01/news/9801010039_1_embryos-julie-garber-reproduction (describing perhaps the most publicized case of attempted posthumous *motherhood*). Julie Garber had her eggs harvested and fertilized using donor sperm while she was undergoing cancer treatments. *Id.* After she died her parents found a surrogate to carry Garber's embryo(s) and a family willing to raise the child. *Id.* The surrogate's pregnancy ended in a miscarriage, but in the interim the case ignited controversy and criticism. *Id; see also* CROCKIN & JONES, *supra* note 42, at 283 (stating that while maternal posthumous reproduction remains relatively unheard of, as egg freezing is made more available the issues of posthumous reproduction will likely expand to maternity).

104. *Woodward*, 760 N.E.2d. at 266 (internal quotation omitted).

105. *Compare id.* (describing how benefits must be awarded to preserve the posthumously conceived children's right to equal protection under the law), *and* Banks, *supra* note 15, at 295-96 (reasoning that posthumously conceived children do not "fall within the typically protected suspect classes" and stating that a state's denial posthumously conceived children's right to inheritance would survive intermediate scrutiny only if there were legitimate state

posthumously conceived children are "children," but not all children fall within the S.S.A.'s definition of children who are eligible to collect survivor's benefits. Clearly they should be entitled to all the constitutional rights and protections of any other child. However, the ability to collect survivor's benefits is not a constitutional right, or even a right at all when one is not a member of the class of intended beneficiaries.[106]

Some scholars have postulated that it is unlikely that Congress would purposefully create legislation with the goal of alleviating the effects of poverty and simultaneously exclude certain "orphaned children" based solely on "the timing of their birth."[107] The purpose of excluding posthumously conceived children is not to penalize them for the timing of their birth or means of conception.[108] Rather, it is to maintain the original intent

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interests to justify the law), *with* Brief for Defendant, *supra* note 87, at 32-33 (explaining that an equal protection analysis examines whether the statute in question treats similarly situated individuals differently). Relatives who were conceived after the death of the wage earner are *not* similarly situated to family members who were at least in utero when the decedent passed away because "they are not lives in being at the relevant time." *Id.*

106. *See* SOCIAL SECURITY, *supra* note 26 (stating upon the death of a parent 98% of children will be entitled to survivor's benefits); *see also* Doucettperry, *supra* note 52, at 16-17, discussing Prudential Insurance Co. v. Moorhead, 916 F. 2d 261 (5th Cir. 1990) (involving a posthumously *born* child who sued to collect military survivor's benefits). The court found that "intermediate scrutiny was appropriate in cases involving illegitimate children to ensure" that the legislation did not have a discriminatory intent. *Id.* The Court in *Capato* dealt with this concern and reasoned, "[n]o showing has been made that posthumously conceived children share the characteristics that prompted our skepticism of classifications disadvantaging children of unwed parents. We therefore need not decide whether heightened scrutiny would be appropriate were that the case." *Capato*, 132 S. Ct. at 2033. As long as there was a rational basis for the legislation, then statutes that serve legitimate government functions are permissible even if they create a "hardship on a particular individual subject to it." *Id.*

107. Banks, *supra* note 15, at 345. *See also* David G. Savage, *Supreme Court Wrestles with Survivors Benefits*, L.A. TIMES, Mar. 19, 2012, *available at* http://articles.latimes.com/2012/mar/19/nation/la-na-court-in-vitro-20120320 (quoting Scalia, who stated that "[w]hat is at issue here is not whether children born through artificial insemination get benefits. It's whether children who are born after the father's death get benefits."). Although Scalia said that it related to the timing of their birth, since *Capato* dealt only with posthumous *conception* and did not pertain at all to posthumous *birth* it can be assumed that Scalia is referring to posthumously conceived children. *Id.* Scalia's comment illustrates that these individuals are barred from collecting survivor's benefits because the timing of their birth precludes them from being included in the legislative intent of aiding *survivors* of the deceased. *Id.* They are not excluded for any discriminatory reason based on a protected class of people, such as illegitimate children. *Id.*

108. *See* Banks, *supra* note 15, at 302 (arguing that "[s]ociety should not punish posthumously conceived children because their parents elected to procreate by assisted reproduction." This argument indicates the misperception that the intent to exclude posthumous children is based upon

of a governmental program. As when a non-widowed single individual decides to undergo assisted reproduction or to adopt, it is a choice they enter into knowingly and they must therefore be expected to have anticipated the social and financial responsibilities of parenthood.[109]

2. How Far Must We Extend Society's Duty to Protect the Best Interest of the Child?

Arguing that survivor's benefits should be awarded to posthumously conceived children in order to serve the best interests of the child fails to acknowledge that, in regards to posthumous conception, there is no element of surprise at having to parent alone.[110] There is no unforeseen misfortune that the government should insulate these families from. The modern reality of single parenthood by choice means that parenthood is planned and the parent–to-be will have considered the financial, social, and emotional undertakings prior to using ART. Since the pregnancy is not a surprise, the expense of raising a child will have been budgeted for and knowingly undertaken.[111]

While providing survivor's benefits to children who *survive* the death of a parent is a valuable aim, it requires a giant leap to reason that society owes a duty to financially support the bereaved in their quest to create the family they would have had if life had gone as planned.[112] Allowing Social Security to be read to encompass such a duty is a dangerous extension of the law far beyond its legislative intent. In fact, the United States Supreme Court previously recognized that the "high duty" of parenthood lies primarily on the parents, not the State.[113]

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the means by which they were brought into the world and is punitive in nature).

109. Deech and Smajdor, *supra* note 36, at 169 (describing that while many single parents may have economic struggles, financial hardship does not befall all single parents, and advocating that legislation and policy should address the "financial ability of prospective parents to support a child . . . separately from their single status.").

110. *Id.* at 168 (stating that "[b]y definition, single parenthood brought about via ART does not come about by accident.").

111. *See id.* (stating the non-accidental nature of parenthood after ART, which allows the secondary conclusion that family budgets will have been adjusted to take the resulting child into account). *See also* MUNDY, *supra* note 13, at 163 (stating that "[t]he important thing . . . is that these were women who had chosen single motherhood rather than being forced into it. Single motherhood wasn't something that happened to them. It was a route they had planned, chosen, mapped out carefully, and deliberately taken.").

112. *See Schafer*, 641 F.3d at 59 (discussing how allowing posthumously conceived children to collect survivor's benefits creates a state-subsidized second chance at starting a family).

113. *See* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925) (stating that "[t]he child is not the mere creature of

Reproductive freedom entails protecting women's right to create a child with their husband's banked sperm after his death.[114] While posthumous conception should be available for individuals who desire it, this does not mean the government has a broad duty to support individuals created in this manner. As the Supreme Court explained in *Harris v. McRae*, "[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."[115] The Court cautioned that extending the right to include an entitlement to government assistance would result in a "drastic change" to the interpretation of the Constitution.[116]

Accordingly, since the child is brought forth with intention and foresight, it does not logically follow that, after the death has occurred, these families should collect a federal benefit specifically designed to protect *surviving* family members from the premature loss of the breadwinner. While claiming to defend the best interest of the child strikes an emotional chord,[117] any children conceived

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the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *see also*, Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 660-61 (2008) (illustrating that the sentiment expressed in *Pierce*, 268 U.S. 510, has a long philosophical tradition and quoting William Blackstone in Commentaries on the Law of England (1766):

> The duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation . . . laid on them not only by nature herself, but by their own proper act, in bringing them into the world . . . . By begetting them therefore they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved.

114. *See* Roe v. Wade, 410 U.S. 113, 169, (1973), (Stewart, J., concurring) *holding modified by* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992) (declaring that "[s]everal decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *see also* Skinner v. State of Okl. *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (stating "[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."); Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (describing the marital right to privacy regarding contraception and sexual relations).

115. Harris v. McRae, 448 U.S. 297, 317-18 (1980). *See also* FRAME, *supra* note 28, at 147 ("[c]laiming a right against interference does not produce an entitlement to assistance.").

116. *Harris*, 448 U.S. at 318.

117. *See Woodward*, 760 N.E.2d at 265 (stating that when considering whether posthumous children should be awarded survivor's benefits, "[f]irst and foremost we consider the overriding legislative concern to promote the best interests of the children."); *but see* Rick Weiss, *Babies in Limbo: Laws*

posthumously (whose conception will un-arguably be intentional and planned) must be the responsibility of the existing parent and not the federal government and taxpayers.

IV. PROPOSAL

The best way to reconcile the legislative intent of Social Security with the reality of posthumous conception is by amending the Social Security Act. Although *Capato* confirmed that state law governs whether or not posthumously conceived children can collect benefits,[118] this reliance on state law is not desirable.[119] When existing statutes are silent on the issue, courts must conjure legislative intent. States where statutes address posthumous reproduction vary in their responses, thereby creating unequal access to benefits. These problems could be averted by adding a brief section to the 42 U.S.C. 416(e) definition of "child" that would require a child to be conceived and in utero prior to the death of their parent.[120]

This proposal will first address why amending the Social Security statute best achieves consistency across state lines and protects legislative intent. This proposal will then explain how such an amendment will protect a financially overburdened system while fulfilling three goals: (1) providing a bright-line test to avoid existing inconsistencies, (2) offering courts the guidance they seek, and (3) aligning the government's response to posthumously conceived children with its response to similarly situated individuals.

Outpaced by Fertility Advances, WASH. POST, Feb. 8, 1998, *available at* www.washingtonpost.com/wp-srv/national/science/ethical/fertility1.htm (pointing out that posthumous conception might fundamentally not be in the best interest of the child and noting that the desires or rights of potential parents, including the dead, are being placed above the welfare of the children being produced); FRAME, *supra* note 28, at 181 ("the right of a widow to have children with her deceased husband does not override a child's right to have two living parents at the time of its conception").

118. *Capato*, 132 S. Ct. at 2031-33.

119. *See* Banks, *supra* note 15, at 259 (stating that presumptively deferring to local law no longer remains a desirable means of determining survivor benefits).

120. 42 U.S.C.A. § 416(e) (although 416(e) is more detailed than this excerpt, the main three categories of child are as follows:

> The term "child" means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only if (A) there was no natural or adoptive parent . . . (B) such person was legally adopted after the death of such individual. . . .

A. Amending the Existing Social Security Legislation Would Best Resolve Post-Capato Inconsistencies

Without taking action to assure consistency across state lines the benefits for posthumously conceived children will continue to differ from one state to the next. When Congress created Social Security it sought to avoid such discrepancies. Prior to the creation of Social Security only five states provided unemployment insurance[121] and the Supreme Court acknowledged that this could serve as a "bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose."[122] Without legislative guidance, it is not farfetched to imagine the following scenario. A couple living in southern New Hampshire learns that the husband has cancer and chooses to bank his sperm. As they examine their options in the event he does not recover, they choose to move just over the border to the neighboring state of Massachusetts. If he survives, they have done nothing more than relocate nearby. If he dies, and the wife then uses his sperm to conceive, this move allows her to receive thousands of dollars in federal survivor's benefits that she and the posthumously conceived child would have been prevented from collecting had they remained in New Hampshire.[123] An amendment to the Social Security statute would prevent this type of conduct.

While matters of family law and intestacy law are typically within the legislative powers of the state,[124] the federal government has increasingly delved into this domain.[125] In fact, "[t]he consensus favoring national power is strongest when there are either horizontal or vertical conflicts between governments caused or aggravated by the boundaries between states."[126]

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121. Steward Mach. Co. v. Davis, 301 U.S. 548, 587-88 (1937) (noting that Wisconsin created a benefits system in 1931, and California, Massachusetts, New Hampshire, and New York did so in 1935).

122. Helvering v. Davis, 301 U.S. 619, 644 (1937).

123. *Compare Khabbaz*, 155 N.H. at 805-06 (denying posthumously conceived children the right to inherit intestate in New Hampshire, and thereby precluding them from collecting survivor's benefits), *with Woodward* 760 N.E.2d at 272 (allowing posthumous children to inherit intestate and thereby providing them with access to survivor's benefits).

124. Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 273-74 (2009) (stating that although the Constitution does not discuss whether authority for family matters is within the province of the states, during the 1800s the Court relied on the concept of "dual federalism" and established a pattern of abstention from family law questions).

125. *See* Estin, *supra* note 123, at 274-77 (describing how the Supreme Court and Congress have both had an extensive role in determining matters of family law).

126. Estin, *supra* note 123, at 279.

Whether survivor's benefits should be awarded to posthumously conceived children is one such horizontal conflict calling for national action. In previous federal governmental intervention into family matters, the government has asserted that it does so to uphold the federal goals of guaranteeing nationwide uniformity in eligibility for federal benefits and cautiously safeguarding the federal treasury.[127] These goals are best accomplished by amending the existing statute to specifically prohibit children conceived after the death of a biological parent from collecting survivor's benefits.

B. The Benefits of Providing a Bright Line Test

Amending the Social Security statute would create a bright line test to easily allow survivor's benefits decisions to be made. Despite criticisms from detractors, bright line tests provide fairness and consistency. The Social Security Administration recently stated that the Legislature is free to draw bright lines in furtherance of their own administrative interests.[128] In contrast, some courts have followed the precedent set forth in *Woodward* and disfavored any type of bright line test that prevents posthumously conceived children from collecting benefits.[129]

In avoiding the obvious bright line test (because, what better bright line is there than death?), proponents of softer standards have set forth far more arbitrary guidelines. In *Woodward*, the court ruled that posthumous children should be allowed to collect survivor's benefits providing that certain genetic, consent, and temporal standards are met.[130] California codified similar standards in an excessively long and convoluted statute that

127. *See* Brief for Plaintiff Bipartisan Legal Advisory Group of the U.S. House of Representatives at 15, Windsor v. U.S., 2012 WL 4338887, (2d Cir. 2012), (justifying the Defense of Marriage Act, an example of federal intervention into family law, by explaining that it promotes two major federal goals: "(1) Ensuring nationwide uniformity in substantive eligibility criteria for federal marital benefits, (2) preserving the federal fisc [sic] . . . ."). Although this paper does not proclaim to support DOMA or make a judgment call as to whether or not DOMA will eventually be held constitutional, it nonetheless stands that the federal government espouses the above as important legislative goals for federal marital benefits and would likely have similar goals for other federal benefits, such as Social Security. *Id.*

128. Brief for Defendant, *supra* note 89, at 35.

129. See Woodward 760 N.E.2d at 262 (stating, "[i]n this developing and relatively uncharted area of human relations, bright-line rules are not favored unless the applicable statute requires them.").

130. *See id.* at 272 (ruling that survivor's benefits should be provided when the child is genetically related to the decedent and the decedent agreed to posthumous conception and to support any resulting child). The court also noted that time limitations may constrain the ability to collect survivors benefits, but did not mention what it considered to be realistic or fair temporal limitations. *Id.*

allows posthumously conceived children to inherit, and thereby collect survivor's benefits, if prior to death an individual consents to have their genetic material used posthumously and designates an individual to have control of the genetic material.[131] The statute also specifies that any such children must be in utero within two years after the decedent's passing.[132]

The consent requirement makes sense in that it protects the rights of the decedent,[133] but it creates an odd advantage for those who can foresee an untimely death. Individuals who can anticipate possible impending death, through a cancer diagnosis or an upcoming tour of duty, can bank their gametes and provide the necessary consent. Where does this leave the widow or widower who loses a spouse in a car accident or a violent crime? In an effort to ignore the obvious bright line that death provides, allowing

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131. CAL. PROB. CODE § 249.5 (West):

> For purposes of determining rights to property to be distributed upon the death of a decedent, a child of the decedent conceived and born after the death of the decedent shall be deemed to have been born in the lifetime of the decedent, and after the execution of all of the decedent's testamentary instruments, if the child or his or her representative proves by clear and convincing evidence that all of the following conditions are satisfied:
>
> (a) The decedent, in writing, specifies that his or her genetic material shall be used for the posthumous conception of a child of the decedent, subject to the following:
>
> (1) The specification shall be signed by the decedent and dated.
>
> (2) The specification may be revoked or amended only by a writing, signed by the decedent and dated.
>
> (3) A person is designated by the decedent to control the use of the genetic material.
>
> (b) The person designated by the decedent to control the use of the genetic material has given written notice by certified mail, return receipt requested, that the decedent's genetic material was available for the purpose of posthumous conception. The notice shall have been given to a person who has the power to control the distribution of either the decedent's property or death benefits payable by reason of the decedent's death, within four months of the date of issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever event occurs first.
>
> (c) The child was in utero using the decedent's genetic material and was in utero within two years of the date of issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever event occurs first. This subdivision does not apply to a child who shares all of his or her nuclear genes with the person donating the implanted nucleus as a result of the application of somatic nuclear transfer technology commonly known as human cloning.

132. *Id.*

133. *See* Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL'Y 332, 360-61 (2009) (discussing the importance of including a consent requirement in any legislation created regarding posthumous conception).

posthumously conceived children to receive survivor's benefits if their biological parent gave consent creates a strange subset of haves and have-nots where certain benefits are awarded to descendants of individuals who plan ahead for their untimely demise. This is counter-intuitive considering the intention to protect individuals from an unexpected death.[134]

C. Providing Courts with Legislative Guidance

In lawsuits regarding posthumous reproduction, courts have noted that legislative guidance would be appreciated.[135] The current legislative void surrounding modern reproductive technologies[136] leaves courts ill-equipped to confront these "Solomonic" decisions that require an ethical balancing act.[137] Interpreting the law becomes difficult when the laws were created well before scientific advancements could have been predicted. The

134. Brief for Defendant, supra note 90, at 36-37 (stating that "[p]osthumously conceived relatives are conceived with full knowledge that the deceased will be unable to provide support, monetary or otherwise" and arguing that since there is no "true loss of support" that excluding posthumously conceived children from inheriting and thereby collecting survivor's benefits is rational).

135. *Compare Khabbaz*, 155 N.H. at 806 (Broderick, J., concurring) (writing a concurring opinion to specifically request legislative guidance, "I write separately to respectfully urge the legislature to examine, within the context of the state's intestacy statute, the confluence of new, ever-expanding birth technologies and the seemingly arcane language and presumptions attendant to the settlement of decedents' estates."), *with Woodward*, 760 N.E.2d at 272,

> As these technologies advance, the number of children they produce will continue to multiply. So, too, will the complex moral, legal, social, and ethical questions that surround their birth. The questions present in this case cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehensive response reflecting the considered will of the people.

See also Helvering, 301 U.S. at 640-44 (showing that in regards to Social Security the courts have looked to the legislature for guidance since the initial 1937 case which upheld the legality of Social Security). The Court explained, "[w]hether wisdom or unwisdom resides in the scheme of benefits set forth in Title II [of the Social Security Act], it is not for us to say. The answer to such inquiries must come from Congress, not the courts." *Id.* at 644.

136. *See* Appleton and Weisberg, *supra* note 15, at 235 (referring to a general absence of laws regarding ART). *See also* PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 29, at xliii (stating that there are no nationally uniform laws or policies related to assisted reproduction and there is minimal government involvement).

137. *See* SPAR, *supra* note 30, at 225 (describing the difficulty of decision-making in the often uncharted waters created by reproductive technology advances by explaining "[these] are exceedingly difficult decisions, Solomonic choices that force us to wrestle with the very meaning of life and love and parenthood. But at the moment we are making these choices in a purely ad hoc way depending on the state [and] the local court system . . . .").

continued presence of posthumous reproduction cases illustrates that it is no longer prudent to wait for state governments to take action. Congress should amend the Social Security statute and thereby create the guidance that courts are seeking.

D. Aligning Posthumously Conceived Children with Other Classes of Survivors and with Other Children of Single Parents by Choice

Amending the statute to prevent posthumously conceived children from collecting benefits is desirable in that it will help create an equal system of benefits distribution. Despite claims that denying posthumously conceived children access to survivor's benefits thereby violates their rights to due process and equal protection, it is standard policy for Social Security to provide survivor's benefits only to spouses, children, dependent grandchildren, and dependent parents who are alive at the time of the decedent's death.[138]

V. CONCLUSION

Posthumous conception carries dramatic emotional appeal because it intertwines the tragedy of death with the joy of a new life. Yet, this newfound ability to bear a partner's children after their death does not create a corresponding societal duty to support these children. Such children are not true survivors of the deceased, and are therefore not entitled to federal aid throughout their childhood. Amending the Social Security Act would still allow posthumously conceived children to inherit via testamentary procedures and to inherit intestate if their state law allows. Amending § 416(e) to specifically require that to be deemed a child the child must be alive or in utero at the time of the decedent's death would resolve existing discrepancies. This change would also prevent society from bearing the financial burden of supporting a widow or widower's second chance at starting a family. To have a second opportunity is a miracle of modern science, but this ability does not create a corresponding societal duty to support these children.

138. *See* Brief for Defendant, *supra* note 90, at 35 (explaining that it is logical to limit benefits to those who are alive at the time of the decedent's death. Although the argument is referring specifically to the Nebraska intestacy statute the argument is relevant particularly because the statute dictates who can collect survivor's benefits).